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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 803

COLORADO MILLING AND ELEVATOR COMPANY,
a Corporation,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

LYMAN J. BISHOP,
212 Union Station,
St. Louis, Missouri 63103,
Garfield 1-6600,
Counsel for Respondent.

ROBERT C. ELY,
722 Chestnut Street,
St. Louis, Missouri 63101,
Chestnut 1-0125,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IV. The side track agreement dated December 23, 1911, provided in the indemnity clause that if Petitioner moved any car set on its industrial tracks then it shall be solely liable for all the consequences and shall save Respondent harmless from all injury to persons "in any manner occasioned by or arising out of such movement * * * whether caused directly by such movement * * * or otherwise howsoever". This agreement does not offend public policy and is sufficiently specific to cover Respondent's own negligence, including any possible antecedent negligence in failing to inspect the brakes..... 9

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

We accept the reference to opinions below, except that the opinion of the Court of Appeals is now reported at 350 F. 2d 273.

JURISDICTION.

We accept the statement as to jurisdiction.

QUESTIONS PRESENTED.

1. Judgment was recovered against Respondent for injuries to Hahn, an employee of Petitioner, resulting from use on Respondent's line of a car not equipped with efficient hand brakes. Is this absolute liability for violation of the Safety Appliance Act based on "negligence"?

2. Finding of Fact No. 6 of the District Court was that the evidence failed to show negligence of Respondent as a cause of the injury to Hahn. Will certiorari be granted to review the evidence and discuss specific facts as to any possible antecedent negligence in failing to properly inspect the brakes?

3. The contract provided that if Petitioner moved any car set on its industrial tracks, then it would be solely liable for all the consequences and shall save Respondent harmless from all injury to persons "in any manner occasioned by or arising out of such movement * * * whether caused directly by such movement * * * or otherwise howsoever," and the Respondent has paid the judgment for an injury to Hahn arising out of such a movement, for which it receives no tariff charge. Can the Petitioner escape liability to Respondent for this loss by proof that Respondent failed to properly inspect the brakes?

4. Does this indemnity contract, or insurance against liability thereunder, violate public policy?

Respondent contends that if any one of the first three questions and the fourth question are answered "No", the judgment was for the right party and certiorari should not be granted.

STATUTE INVOLVED.

The statute involved is the Safety Appliance Act (45 U. S. C. A., Sections 1-16), and particularly Section 11, which is properly quoted in the Petition for Certiorari.

There is no statutory duty to inspect hand brakes. 49 U. S. C. A., Sec. 26 (e), relates to "block signal systems, interlocking, automatic train stop, train control, and cab-signal devices" (45 U. S. C. A., Sec. 26 (b)). 49 C. F. R. 131.1 designates the "number, dimensions, location, and manner of application" of safety appliances on box cars, including hand brakes, under authority granted the Interstate Commerce Commission by 45 U. S. C. A., Sec. 12, but no requirement is made as to inspection. Inspection at interchange is a precaution taken to prevent acceptance of defective cars and the manner and extent of that inspection is governed by the custom of the railroad industry.

STATEMENT.

The essential facts are stated in the opinion of the Court of Appeals, but Respondent would add the following:

The petition in this indemnity action stated that, in response to the request to defend the Hahn suit, the Petitioner here replied that the matter had been referred to American Motorists Insurance Company, its insurance carrier, and that company later denied the request (R. 3). The answer stated that the Petitioner here was without knowledge or information sufficient to form a belief as to the truth of these averments (R. 6), but it was stipulated at the trial that the demand was made and the Petitioner here refused the demand and denied liability under the agreement (R. 23).

If the Petitioner had requested that the car be moved by Respondent after it had been set out on the industrial tracks, then a tariff charge would have been made for such intra plant switch move, but since Respondent moved the car itself, no charge was made (R. 25).

BASIS OF FEDERAL JURISDICTION IN THE DISTRICT COURT.

This indemnity action was filed by Respondent in the Circuit Court of the City of St. Louis, Missouri, and was removed to the District Court of the United States for the Eastern District of Missouri by the Petitioner on the grounds of diversity of citizenship under 28 U. S. C. A., Sec. 1441.

ARGUMENT.

The opinion of the Circuit Court of Appeals agreed with the District Court that the evidence failed to show negligence of Respondent as a cause of the injury to Hahn, and hence failed to rule on Respondent's contention that the indemnity agreement covered any injury arising out of the movement of the car by the Petitioner, **no matter what the cause**, and was sufficiently specific to cover both the violation of statutory duty and any antecedent negligence of Respondent. We here contend that, for this additional reason, judgment was for the right party and certiorari should be denied.

I.

Violation of the Safety Appliance Act Is Not "'Negligence."

Petitioner first argues that the violation of the Safety Appliance Act, resulting in injury to Hahn when the car was moved, was "negligence", in spite of the fact that the Hahn case held that Respondent was liable if the car was being used on its line "irrespective of fault" (**Hahn v. Terminal Railroad Association of St. Louis**, Mo., 355 S. W. 2d 867, 870 (1)). Respondent objected to any evidence of negligence in the Hahn case since it would not have been permitted to introduce evidence of care, "however assiduous" (**Brady v. Terminal Railroad Association of St. Louis**, 303 U. S. 10, 15, 58 S. Ct. 426, 82 L. Ed. 614).

The decisions of this Court, cited by the Court of Appeals, amply sustain its conclusion that violation of the Safety Appliance Act does not imply that negligence was involved, and that since negligence was not an issue in the **Hahn** case, it follows that Petitioner does not stand convicted of negligence merely because of evidence of violation of an absolute statutory duty. However, we

would like to call specific attention to the words of Mr. Justice Clark in **Carter v. Atlanta & St. A. B. R. Co.**, 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236 (l. c. 434):

> "* * * Sometimes that violation is described as 'negligence per se' * * *; but we have made it clear * * * that term is a confusing label for what is simply a violation of an absolute duty."

Petitioner apparently concedes that the indemnity agreement covered this loss, were it not for the claimed "negligence" of Respondent. Recovery was based on violation of the statutory duty. The claim that Respondent was also guilty of common law negligence in failing to inspect the brakes could not possibly be a defense to this indemnity action for the loss resulting from violation of the statutory duty. It has no sounder basis than a claim that the violation of a statutory duty is a defense to an indemnity action arising out of the movement of a car by the Petitioner (**Terminal Railroad Association of St. Louis v. Ralston-Purina Co.**, 352 Mo. 1013, 180 S. W. 2d 693).

II.

Certiorari Will Not Be Granted to Review the Evidence of Common Law Negligence.

Finding of Fact No. 6 of the District Court was that the evidence failed to show negligence of Respondent as a cause of injury to Hahn. The opinion of the Court of Appeals held that this finding was sustained by evidence that the customary visual inspection had been made, that an operational inspection at interchange is not practical, and that the defect could have arisen after delivery of the car to Petitioner.

Mr. Justice Holmes, speaking for this Court, in **United States v. Johnston**, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925, stated (l. c. 227):

"* * * We do not grant a certiorari to review evidence and discuss specific facts. * * *"

Federal Trade Commission v. Standard Oil Company, 355 U. S. 396, 78 S. Ct. 369, 2 L. Ed. 2d 359, per Clark, J. (l. c. 398):

"* * * Having concluded that the case turns on a factual issue, decided by the Court of Appeals on a fair assessment of the record, we affirm the decision below. * * *"

Rudolph v. United States, 370 U. S. 269, 82 S. Ct. 1277, 8 L. Ed. 2d 484, per Curiam (l. c. 270):

"* * * Such ultimate facts are subject to the 'clearly erroneous' rule * * * and their review would be of no importance save to the litigants themselves. The appropriate disposition in such a situation is to dismiss the writ as improvidently granted. * * *"

Mr. Justice Frankfurter, dissenting in **Sentilles v. Inter-Caribbean Shipping Corp.,** 361 U. S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142 (l. c. 112):

"* * * The practice of not taking cases turning solely on the evaluation of evidence has been consistently adhered to, barring an occasional sport like Dick v. New York Life Ins. Co., 359 U. S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935, except in the special class of cases arising under the Federal Employers' Liability Act and its twin, the Jones Act. * * *"

This is not an action under the Federal Employers' Liability Act or Safety Appliance Act. Liability under the Safety Appliance Act has been discharged. This is a contract action under an idemnity agreement to recover the amounts paid to discharge that liability.

Adhering to this rule, we will not review the evidence and discuss specific facts relating to the inspection made by Respondent. Regardless of that inspection, the defect

could have arisen after delivery of the car to the Petitioner (**Republic Elevator Co. v. Lund**, C. C. A. 8, 196 F. 745, 751). In any event Petitioner made no inspection and, even if the inspection made by Respondent did not meet the standard of due care, then both Petitioner and Respondent would be guilty of common law negligence, were it not for the Safety Appliance Act (**Union Stockyards Co. v. Chicago, B. & Q. R. Co.**, 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453).

III.

Finding That Missouri Law Permits Indemnity for Loss Caused by the Negligence of Indemnitee, if the Contract Is Sufficiently Specific, Will Be Accepted by This Court.

The opinion of the Court of Appeals held that this indemnity agreement did not violate public policy (350 F. 2d 273, 278):

> "* * * The Missouri court holds, as do most courts, that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts where such intention is not plainly expressed in the contract. * * * This contract was made by the Railroad in its private capacity rather than as a common carrier and it could, therefore, relieve itself by indemnity, not only for its own negligence if the contract was sufficiently specific, but also against absolute liability as imposed by the statute."

The opinion concludes that, since there was no evidence of negligence shown, they would not discuss the contention that the District Court erred in holding that the contract was not so definite and specific as to provide indemnity for liability based on negligence.

Mr. Justice Reed, speaking for this Court in **General Box Company v. United States**, 351 U. S. 159, 76 S. Ct. 728, 100 L. Ed. 1055, stated (l. c. 165):

"* * * We ordinarily accept the determination of the Court of Appeals on questions of local law, and we do so here. * * *"

This is a settled rule of this Court (**Bernhardt v. Polygraphic Co.**, 350 U. S. 198, 204-205, 76 S. Ct. 273, 100 L. Ed. 199; **Sims v. United States**, 359 U. S. 108, 114, 79 S. Ct. 641, 3 L. Ed. 2d 667; **County of Allegheny v. Mashuda Company**, 360 U. S. 185, 191, 79 S. Ct. 1060, 3 L. Ed. 2d 1163).

IV.

Indemnity Agreement Does Not Offend Public Policy and Covers Loss Arising Out of Movement of a Car by Petitioner, No Matter What the Cause.

We could rest our argument upon the above quotation from the opinion of the Court of Appeals, and simply point out that the language of the indemnity agreement is sufficiently specific to cover the injury to Hahn arising out of the movement of the car by Petitioner, no matter what the cause. The agreement that if Petitioner moves any car, it will save Respondent harmless from all injury to persons "in any manner occasioned by or arising out of such movement * * * whether caused directly by such movement * * * or otherwise howsoever," can have no other meaning. However, we think that a review of the Missouri decisions will be of assistance to this Court.

Wabash R. Co. v. Ordelheide, 172 Mo. 436, 72 S. W. 684, was an action to recover money paid in satisfaction of judgments for loss of property stored in a grain elevator which was destroyed by fire. The elevator was constructed on railroad right of way under a lease providing that Ordelheide would assume all risk of fire and hold harmless the railroad from any damage by fire to any building erected on the land leased, or contents. Section 1111, Mo. R. S. 1899 (Sec. 537.380, Mo. R. S. 1959), made railroads

liable in damages for property destroyed by fire communicated by locomotive engines. It was contended that if the indemnity covered loss caused by negligence of the railroad, then it was against public policy and void. The court en banc, per Valliant, J., affirmed judgment for the railroad and held (l. c. 443-444):

> "That statute renders the railroad company liable when property is destroyed by fire communicated from a locomotive in operation on its road regardless of negligence. * * * The law of negligence has nothing to do with a case under that statute. What the law has made immaterial, a party can not by inserting it in his pleading make material.
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> * * * * * * * *
>
> But if we should admit the question of negligence as an issue in the case the defense has no foundation on that fact.
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> * * * * * * * *
>
> As between the shipper or the passenger on the one side and the common carrier on the other, the latter is liable for its acts of negligence, anything in the contract for transportation to the contrary notwithstanding. But that rule of law, founded as it is on public policy, does not prevent a corporation engaged in the business of a common carrier from taking insurance to indemnify itself against damages it may be required to pay to the shipper or a passenger on account of the negligence of its servants."

In a companion case, judgment for Ordelheide for loss of the elevator was reversed (**Ordelheide v. Wabash R. Co.**, 175 Mo. 337, 75 S. W. 149).

Kansas City, M. & R. R. Co. v. Southern Ry. News Co., 151 Mo. 373, 52 S. W. 205, was an action to recover $5,000 paid by the railroad in settlement for the death of Davis, an employee of the news company, which had been

granted the privilege of selling newspapers on trains for one year in consideration of $1,500 and indemnifying railroad against loss sustained by any employee of the news company while upon cars, whether from negligence of the railroad "or otherwise". The engineer had left a sleeping car at Birmingham and was backing the train to the station when a collision with another train occurred. Conceding that Davis was a passenger, the court, per Brace, P. J., reviewed numerous decisions, including **Phoenix Ins. Co. v. Erie & W. T. Co.**, 117 U. S. 312, 6 S. Ct. 750, 29 L. Ed. 873, 879, and **California Ins. Co. v. Western Compress Co.**, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730, 738, and held (l. c. 389):

> "The only distinction between those cases and the one in hand, is that in them the contracts were formal contracts of insurance with insurance companies, while the contract in question is a contract of indemnity by a news company. But a mere contract of insurance is nothing more nor less than a contract of indemnity against loss, as is this with the defendant, and the principles governing must be the same in each, and as nothing can be predicated of the contract in this case which could interfere with or affect the liability of the carrier to the person injured, there is nothing in it to take it out of the principle of those cases, or render it obnoxious to public policy. Hence we conclude that this contract can not be avoided as against public policy."

The validity of indemnity agreements against liability for injury to employees, not parties to the agreement, was settled for all time by **Breeden v. Frankford, M., A. & P. G. Ins. Co.**, 220 Mo. 327, 429-431, 119 S. W. 576, where the Missouri Supreme Court rejected the argument that a distinction should be drawn between indemnity against property loss and indemnity against personal injuries caused by negligence of the indemnitee.

Terminal Railroad Association of St. Louis v. Ralston-Purina Co., 352 Mo. 1013, 180 S. W. 2d 693, directed judgment for the plaintiff railroad in an action on an indemnity contract. The industrial track agreement required that the industry furnish and maintain a roadbed with 8 feet 6 inches clearance on either side of the center line of the industrial track, and:

> "Fifteenth. The Industry shall save and hold harmless the Railroad from all loss, damage, injury or death caused by obstructions being closer to the Industrial track than specified herein."

Uhl, a railroad switch foreman, was killed when he attempted to uncouple a car in a tunnel through the industrial building at a point where the clearance was only 5 feet 5 inches. The knuckle lock hung and the cars failed to uncouple when the pin was lifted. Uhl was caught in the close clearance space when the cars moved in response to his signal. Railroad settled for $20,000, so the cause of the loss was not res adjudicata. The court held that it was not contrary to public policy for an indemnitee to contract with an indemnitor to save him harmless, as to third persons, even though the loss sustained was the "result of his own negligence of that of his servants." It was further held that (l. c. 695):

> "As to whether an indemnitee can recover for losses caused by his own negligence depends on the language of the indemnity contract and what may be termed the subject matter thereof. * * *"

and, under the language of the contract, the close clearance was a cause of the loss for which the industry was liable, even though the loss was caused, in part, by the violation of the Safety Appliance Act.

In the instant case the injury to Hahn was an injury "arising out of" the movement of the car by Petitioner, whether "caused" by such movement, "or otherwise how-

soever" (**Schmidt v. Utilities Ins. Co.**, 353 Mo. 213, 182 S. W. 2d 181, 183-184, defining "arising out of" as "originating from", "having its origin in", "growing out of", or "flowing from", being much broader than "caused by").

Petitioner removed this action from the Circuit Court for the City of St. Louis, Missouri, where Respondent would most certainly have recovered under the law of Missouri. **Guaranty Trust Co. v. York**, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, per Frankfurter, J. (l. c. 109):

> "* * * The nub of the policy that underlies Erie R. Co. v. Tompkins (304 U. S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188) is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. * * *"

The federal District Court and the Circuit Court of Appeals have entered judgments for the Respondent. Jurisdiction to review such a diversity case by certiorari was not conferred upon this Court merely to give the defeated party another hearing (**Magnum Import Co. v. Coty**, 262 U. S. 159, 163, 43 S. Ct. 531, 67 L. Ed. 922).

V.

Certiorari Should Be Denied Under Rule 19.

There are no special and important reasons for granting certiorari in this case. The only federal question is whether or not violation of the Safety Appliance Act constitutes "negligence", and the decision of the Circuit Court of Appeals that it does not is supported by all the recent decisions of this Court. Petitioner has failed to demonstrate that the decision of the Circuit Court of Appeals is in conflict with Missouri law, or with a decision of another Circuit Court of Appeals on the same matter.

The Evarts Act of March 3, 1891 (26 Stat. at L. 826, chap. 517), created the Circuit Courts of Appeal to relieve the growing appellate docket of the Supreme Court of the United States. Judgments of the Circuit Courts of Appeal were made final, but this Court was given discretionary power to review by certiorari, thus relieving it of all duty of adjudication in cases that are important only to the litigants (**Forsyth v. Hammond**, 166 U. S. 506, 514-515, 17 S. Ct. 665, 41 L. Ed. 1095; **Dick v. New York Life Ins. Co.**, 359 U. S. 437, 448, 79 S. Ct. 921, 3 L. Ed. 2d 935, dissent of Frankfurter, J.). Special and important reasons imply a reach to a problem beyond the academic or the episodic (**Rice v. Sioux City Cemetery**, 349 U. S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897).

CONCLUSION.

The decision of the Circuit Court of Appeals was for the right party and certiorari should be denied under Rule 19.

Respectfully submitted,

LYMAN J. BISHOP,
212 Union Station,
St. Louis, Missouri 63103,
GArfield 1-6600,
Counsel for Respondent.

ROBERT C. ELY,
722 Chestnut Street,
St. Louis, Missouri 63101,
Of Counsel.